NO. 48589-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DWAYNE PATRICK COWART, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 14-1-01149-2

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Where juror eighteen's responses did not show that she lacked the ability to try this case impartially and without prejudice to the substantial rights of the defendant, did the trial court abuse its discretion by denying a for cause challenge? 1

2. Should this Court exercise its discretion and award appellate costs to the state if the state substantially prevails, and should this Court defer consideration of the defendant's ability to pay as an issue to be resolved in any future motion for revision or objection to any future collection effort? 1

B. STATEMENT OF THE CASE. 1

1. Proceeding 1

2. Facts 3

C. ARGUMENT 7

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO EXCUSE JUROR EIGHTEEN FOR CAUSE WHERE THE JUROR'S RESPONSES DID NOT SHOW THAT SHE COULD NOT TRY THE CASE IMPARTIALLY AND WITHOUT PREJUDICE TO THE SUBSTANTIAL RIGHTS OF THE DEFENDANT 7

2. IN THE EVENT THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY THIS COURT SHOULD EXERCISE ITS DISCRETION, AWARD APPELLATE COSTS AND DEFER CONSIDERATION OF THE DEFENDANT'S ABILITY TO PAY PENDING A FUTURE MOTION FOR REVISION OR AN ATTEMPT TO COLLECT 21

D. CONCLUSION. 26

Table of Authorities

State Cases

Hough v. Stockbridge, 152 Wn. App. 328, 216 P.3d 1077 (2009).....9

Ottis v. Stevenson-Carson Sch. Dist. No. 303, 61 Wn. App. 747, 753, 812 P.2d 133 (1991).....9

State v. Baldwin, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991).....24

State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1977).....22

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).....22, 23, 24, 26

State v. Blank, 80 Wn. App. 638, 643, 910 P.2d 545 (1996).....23

State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).....24

State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995).....7

State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008).....24

State v. Farnsworth, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).....15

State v. Fire, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001).....13

State v. Gonzales, 111 Wn. App. 276, 277, 45 P.3d 205 (2002).....7, 8

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....15

State v. Jorden, 103 Wn. App. 221, 229, 11 P.3d 866 (2000).....8

State v. Momah, 167 Wn.2d 140, 217 P.3d 321, 326 (2009).....14

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000).....22, 23

State v. Perez, 166 Wn. App. 55, 67, 269 P.3d 372 (2012).....8

State v. Rogers, 127 Wn.2d 270, 281, 898 P.2d 294 (1995).....22

State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987).....9

State v. Shirts, 195 Wn. App. 849, 854-55, 381 P.3d 1223 (2016).....24

State v. Sinclair, 192 Wn. App. 380, 367 P.2d 612 (2016).....22, 23

State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009).....24

State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007).....8

State v. Wright, 97 Wn. App. 382, 965 P.2d 411 (1999).....24

Federal and Other Jurisdictions

Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....14

United States v. Schlette, 842 F.2d 1574, 1577 (9th Cir. 1988).....9

Washington v. Recuenco, 548 U.S. 212, 218–19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).....14

Constitutional Provisions

Article 1, section 22 of the Washington Constitution 7

Sixth Amendment.....7

Statutes

Laws of 1995, Ch. 275 § 3.....22

RCW 10.01.160.....22, 25

RCW 10.01.160(3).....25

RCW 10.73.160.....22, 23, 25

RCW 10.73.160(2).....21

RCW 10.73.160(3).....25

RCW 10.73.160(4).....23, 24

RCW 2.36.110 8

RCW 4.44.150 - .190 8

RCW 4.44.170(2) 8

Rules and Regulations

CrR 6.4(c)(2) 8

RAP 14.2 22

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where juror eighteen's responses did not show that she lacked the ability to try this case impartially and without prejudice to the substantial rights of the defendant, did the trial court abuse its discretion by denying a for cause challenge?

2. Should this Court exercise its discretion and award appellate costs to the state if the state substantially prevails, and should this Court defer consideration of the defendant's ability to pay as an issue to be resolved in any future motion for revision or objection to any future collection effort?

B. STATEMENT OF THE CASE.

1. Trial Proceedings.

On March 26, 2014, Appellant Dwayne Patrick Cowart (the "defendant') was charged with one count of first degree assault of a child that included two exceptional sentence allegations. CP 1-4. The victim was the defendant's two month old daughter, B.C., who at the time of the initial charging was on life support in the hospital. CP 1-4. B.C. died on April 16, 2014, and on May 9, 2014, the charge was amended to second degree felony murder predicated on first or second degree assault of a child with the same two exceptional sentence allegations. CP 12-14.

The case proceeded to trial on November 15, 2015. RP 14[1]. Following pre-trial motions, *voir dire* commenced with a jury questionnaire and individual questioning on November 17, 2015. RP 171, 186-89. The parties and trial court agreed on a list of jurors to be examined individually out of the presence of the other jurors. *Id.* Juror eighteen was one of those jurors.

Juror eighteen was examined individually by the court and both parties. RP 233. The juror expressed concern about the subject matter of the trial but also testified that she had not made up her mind, "Because I don't know what happened." RP 238. The defense moved to excuse juror eighteen for cause. RP 239. Under further questioning, in response to a question about whether the juror can be a fair juror to both sides, the juror uncertainly said, "I think so." RP 240. However the juror indicated that she could follow the court's instructions on the law, saying, "I would hope so." RP 241. After hearing the juror's responses the trial court denied the motion to excuse for cause. RP 243.

Juror eighteen returned to court for general *voir dire* the next day. RP 377, 399-401. She answered further questions from the defense. *Id.* At the conclusion of general *voir dire,* outside the presence of the panel, the parties were invited to make any further challenges for cause. RP 426. The defense challenged four additional jurors but not juror eighteen. RP

[1] The record in this case includes pre-trial, trial and post-trial proceedings before the trial department. The verbatim reports consist of nineteen volumes with consecutively numbered pages.

426-30. The trial court granted two of the defense challenges (including juror nineteen) and denied the challenge as to the other two. *Id.* Thereafter, the parties exercised their peremptory challenges.

The defense exercised six of its eight peremptory challenges without excusing juror eighteen. CP 287, Peremptory Challenges sheet. CP 294-97, revised Original Jury Panel Selection List. The defendant then passed twice. *Id.* As a result juror eighteen was seated and became juror seven. CP 178.

Testimony commenced on November 19, 2015. RP 507. The state called 28 witnesses. CP 297-99, Witness Record. The defense called four, including the defendant. *Id.* The jury heard closing arguments on December 16, 2015, deliberated and returned a guilty verdict the next day on December 17, 2015. RP 2073, 2175. The defendant was found guilty of second degree murder and both exceptional sentence allegations. CP 227-230. On February 5, 2016, the defendant was sentenced to an exceptional sentence of 840 months in prison.

2. Statement of Facts.

The victim in this case was a two month old baby girl, BC. RP 668-69. She was the daughter of the defendant and Mary Cowart and lived with them in a Dupont apartment near Joint Base Lewis-McChord. *Id.* Both parents were in the army and worked on base at Fort Lewis. RP 670-75. They shared caregiving for BC after Ms. Cowart returned to work after six weeks maternity leave. RP 673-74. Ms. Cowart generally

worked days while the defendant worked nights. *Id.* When their schedules left a gap, Ms. Cowart arranged for BC to be cared for by a friend. RP 674-75.

The incident that led to the charges took place during the afternoon of March 28, 2014. RP 538-39. Between approximately 12:40 pm [RP 688] and 3:41 pm while the defendant was his daughter's sole caretaker [RP 538-40], she suffered grievous, life-threatening injuries that caused her to stop breathing and go into cardiac arrest. RP 540-43. She was rushed to Madigan hospital. On the way her heart rate was restored and her "skin color came back when we were about halfway into transportation to the hospital, but we could not feel a pulse . . . ." RP 542.

The emergency department administered "pediatric advanced life saving" treatment. RP 572. An emergency CT scan showed that BC had been injured in three areas of her body: (1) she suffered fractures to her skull with associated internal injuries to her brain and the structures supporting her brain; (2) multiple rib fractures in "multiple stages of healing"; (3) a spiral facture of her right femur. RP 575-578. The internal injuries to the baby's brain were assessed as the cause of her cardiac and respiratory arrest. RP 578. RP 1657. The rib and femur fractures were diagnostic of "abuse or non-accidental trauma. . . ." RP 575-76.

The victim was transported to Mary Bridge. A number of witnesses became involved in B.C.'s case. She was treated by pediatric specialists until her death on April 16, 2014. RP 1386, et. seq. RP 1649

et. seq. Her case was also referred to Child Protective Services and investigated by a social worker. RP 1414. RP 1759. Her case was also reviewed by the Medical Director of the Child Abuse Prevention Center, Yolanda Duralde. RP 1315. B.C's fractures and broken bones were particularly concerning for inflicted, abusive trauma because "infants really don't have enough force to injure themselves. So particularly injuries that we look at in children are broken bones that they have, because unless there is a very good history of how they occurred accidentally, that's not something that they would do themselves." RP 1328. Dr. Duralde also testified about B.C.'s pain response to the injuries. The femur fracture alone was incredibly painful and Dr. Duralde stated that "Femur fractures are very painful . . . the child would scream initially and it would be very painful. In Bella's case, she actually was still having some muscle spasms when she came into the hospital and that actually is painful as well."

The treatment at Mary Bridge left B.C. on life support and with severe neurological impairment and no hope of recovery. RP 1669-72. B.C.'s mother and family in consultation with the Mary Bridge ethics committee elected to discontinue life support. RP 1602-09. After B.C.'s death, on April 17, 2014, the Pierce County Medical Examiner conducted an autopsy. RP 1107. Dr. Thomas Clark's findings included:

> The cause of death is blunt force injury to the head with contributing conditions of healing skeletal injury. The reason that that makes a difference is that it causes this death to be coded as battered child syndrome. A battered child is one who dies of acute injury or immediate injury, but who also has evidence that injuries occurred over a period of time.
>
> RP 1136-37.

The defendant's account of B.C.'s afternoon leading up to the 911 call was provided both by statements to the police and his own testimony. The earliest statement was to a patrol officer who asked what was going on at the scene before having received information about suspected abuse from Madigan. RP 618-20. The defendant admitted having cared for the victim all afternoon after Mary Cowart brought her home and went back to work. *Id.* He claimed that he fell asleep twice and so did the victim, and that after she woke up the second time he called 911. RP 618-25.

After the extent of the damage was revealed at the hospital, the defendant was interviewed at length by detectives on video tape. Exhibits 74 and 75. That interview was admitted and published to the jury. In it the defendant denied having done anything to injure B.C., but admitted he was the one caring for her and that it must have happened while he was sleeping. *Id.*

Throughout the testimony the defense suggested that Mary Cowart, rather than the defendant, had inflicted the injuries even though she was at work for the three hours leading up to the 911 call, and even though her

testimony was supported by the babysitter and a photograph showing that B.C. was in good health and good spirits just before she was left in the defendant's care. RP 683-91, RP 1296. In closing argument the defense blamed Ms. Cowart for all of the injuries and sought to convince the jury that she had not bonded with B.C., and that the defendant had, and thus was more likely to have inflicted the injuries. RP 2099, 2109, 2120.

The jury deliberated during two days on December 16 and 17, 2015. RP 2073, 2175. It returned a guilty as charged verdict which included special verdict findings as to the two exceptional sentence allegations. CP 227-30. Following sentencing on February 5, 2016, the defendant filed this timely appeal. CP 257-75.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO EXCUSE JUROR EIGHTEEN FOR CAUSE WHERE THE JUROR'S RESPONSES DID NOT SHOW THAT SHE COULD NOT TRY THE CASE IMPARTIALLY AND WITHOUT PREJUDICE TO THE SUBSTANTIAL RIGHTS OF THE DEFENDANT.

The right to trial by an impartial jury is a constitutional right. ***State v. Gonzales***, 111 Wn. App. 276, 277, 45 P.3d 205 (2002) ("The right to trial by an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution."), citing ***State v. Brett***, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). Challenges of prospective jurors for cause preserve and protect

the constitutional right by ensuring impartiality of the jury. *Id.* at 277-78. In Washington the standard to be applied to challenges for cause of prospective jurors is derived from the criminal rules and statutes. CrR 6.4(c)(2). RCW 2.36.110. RCW 4.44.150 - .190. In particular, concerning actual bias, the standard is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights" of the challenging party. RCW 4.44.170(2), quoted in ***State v. Gonzales***, 111 Wn. App. at 278.

A. *Juror Eighteen was not shown to have had preconceived ideas that would prevent her from trying the defendant's case fairly and impartially.*

The standard of review in this case is abuse of discretion. ***State v. Perez***, 166 Wn. App. 55, 67, 269 P.3d 372 (2012), ***State v. Wilson***, 141 Wn. App. 597, 607-08, 171 P.3d 501 (2007). The judge presiding over the trial, the judge who saw and heard the juror in person, is in the best position to determine whether to excuse a juror for cause. *Id.* In "deciding whether to grant or deny a challenge for cause based on bias, the trial judge has 'fact-finding discretion' . . . This discretion allows the judge to weigh the credibility of the prospective juror based on his or her observations." ***State v. Jorden***, 103 Wn. App. 221, 229, 11 P.3d 866 (2000) (citations omitted), citing ***Ottis v. Stevenson-Carson Sch. Dist. No.***

303, 61 Wn. App. 747, 753, 812 P.2d 133 (1991), and ***State v. Rupe***, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). Appellate courts should thus defer to the trial court's discretion and, as in other cases of discretionary rulings, should reverse the trial court only if they have "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached." ***United States v. Schlette***, 842 F.2d 1574, 1577 (9th Cir. 1988).

In cases involving alleged actual bias, the "question for the judge is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially." ***Hough v. Stockbridge***, 152 Wn. App. 328, 341, 216 P.3d 1077, 1084 (2009). In this case there has been no showing that juror eighteen could not do so.

Trial judges are called upon to rule on challenges for cause day in, day out, in trial, after trial. Furthermore trial judges are particularly attentive to any hint of juror bias that might impact the constitutional right to an impartial jury and a fair trial in a criminal case. With that perspective in mind, in this case it can hardly be said that the trial court committed a clear error of judgement in denying the for cause motion in this case.

For obvious reasons, in light of the emotional impact of the facts and evidence in a murder case involving a two-month old baby, the trial court authorized a juror questionnaire and time consuming individual questioning of the entire panel. RP 16, 187 et. seq. Those decisions were

the first indications of the appropriate exercise of discretion by the trial court. As to juror eighteen, the court led off the questioning concerning the juror's answers to certain questions on the questionnaire. RP 233. The court asked the juror directly in light of the juror's answers: "The issue is whether you can keep an open mind and listen to all the evidence in this case and be a fair and impartial juror. Do you think you can do that?" *Id.* When the juror hesitated in her answer, the court asked the juror to explain. RP 234. It is likely that even the defendant would find little to complain about in the trial court's handling of the issue to this point in the record.

The trial court concluded its questioning of juror eighteen by inquiring whether the juror could hold the prosecution to its burden of proof. The juror assured the court that she would try even though personally the juror would never "raise a hand in anger to a child". RP 235. Having heard the juror express a sentiment shared by all responsible adults, the trial court turned the floor over to the parties. Again to this point, even the defendant would have little quarrel with the trial court's conduct of *voir dire* in this case.

The prosecution's questions elicited what appeared to be the root cause of juror eighteen's hesitation, namely press reports about the case or a similar child abuse case. RP 237. After that revelation the juror was asked whether the juror had already made up the juror's mind in light of not having heard any evidence or facts. The juror's response was exactly

the response anyone would hope of an impartial juror:

> Q. One last question, I guess to try to flush this out a little bit more. As you're seated here now as a potential juror, having heard nothing about the case except for what the charges are, you've heard no testimony, other evidence, or anything about the facts, have you already made up your mind about whether or not this defendant is guilty?
> A. No.
> Q. Why not?
> A. Because I don't know what happened.
>
> RP 237-38.

The defense likewise questioned juror eighteen in the trial court's presence concerning actual bias. RP 239. The juror honestly and openly reiterated the juror's uncertainty about the subject matter of the trial in light of the juror's personal attitude toward child abuse. RP 240. What the juror did not do was express any sentiment that the juror would view the evidence with a jaundiced eye favoring conviction or the prosecution, nor that the juror had made up the her mind about the defendant's guilt in light of not having heard the evidence and not knowing what happened. *Id.*

The trial court allowed further questioning, again demonstrating appropriate discretion. Under additional questioning the juror (1) committed to following the law [RP 241], (2) acknowledged that the publicity may have been about this case or about another case [RP 242-43], and (3) while being uncertain what emotional reaction the case might

elicit, at no time stated that her decision would be an emotional decision irrespective of the evidence and the law [RP 238]. The trial court denied the motion to excuse the juror for cause but did not indicate that the motion could not be renewed during general *voir dire* yet to come.

During general *voir dire* the defense opened a line of questions concerning whether one or the other parent of a child could hurt a child. RP 399. Juror eighteen was asked to respond and said: "I agree with what he said. I agree a mother can be just as capable of abuse as a father, and we don't know the circumstances until we hear it all. So we need to have open minds. It's just it's hard in a case like this." RP 399-401. In a direct response concerning actual bias against the defendant, the juror further stated, "But we always owe it to the defendant to have an open mind and listen, to weigh the evidence." RP 400-01.

Following general *voir dire* the trial court gave the parties a chance to make additional for cause challenges. RP 426. The defendant sought to excuse four jurors for cause but not juror eighteen. *Id.* Of the four challenges the trial court excused two, kept two and provided the parties a chance to argue and then recited the reasons for its decision. RP 426-30. Juror eighteen was not challenged and thus not excused for cause at the end of general *voir dire*.

The trial court's conduct of *voir dire* was exemplary. The parties had ample opportunity to challenge jurors for cause. The lack of a defense motion as to juror eighteen at the end supports the view that the defense had resolved any concern it may have originally had about that particular juror.

The defense peremptory challenges further support the view that juror eighteen was not tainted with bias in the eyes of the defense. The defendant did not excuse juror number eighteen with a peremptory challenge and yet could have. CP 287, Peremptory Challenges sheet. The defense had two challenges left and passed. In fact, the defendant excused the juror immediately before eighteen, but left eighteen on the panel. *Id.* It can be inferred from the overall peremptory challenge record that the defense view during the trial court proceedings was that juror eighteen did not have a significant bias. *See* CP 173, 178, 287, 288-92, 293, and 294-97.

B. Structural error has not been established that would warrant automatic reversal even if it could be said that the trial court abused its discretion.

Had the defendant in this case exhausted his peremptory challenges and thus not been able to excuse juror eighteen, his assignment of error would be more compelling but still would not warrant automatic reversal. ***State v. Fire***, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001). A

defendant who exhausts his peremptory challenges "curing" an alleged trial court for cause error can pursue an appeal but must also demonstrate prejudice. *Id.* The rule has been stated as follows, "[I]f a defendant through the use of a peremptory challenge elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted." *Id.*

By contrast, structural error would warrant automatic reversal. ***State v. Momah***, 167 Wn.2d 140, 149–50, 217 P.3d 321, 326 (2009). "An error is structural when it 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' " *Id.*, quoting ***Washington v. Recuenco,*** 548 U.S. 212, 218–19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and ***Neder v. United States,*** 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In ***Momah,*** an admitted closure of the courtroom during jury selection in a highly publicized sex abuse case was not structural error and thus application of the invited error doctrine was permissible and the closure did not warrant reversal. *Id.* at 156. Nor is automatic reversal warranted here.

If the initial for cause ruling concerning juror eighteen was error, it was not structural error. The discussion above concerning the defense

acceptance of juror eighteen undercuts any claim that this trial was fundamentally unfair. The defendant did not exhaust his peremptory challenges. He had two left and passed without using them against juror eighteen. Thus it can be said that by the end of *voir dire* the defendant had changed his mind about juror eighteen and elected to keep her on the jury. This is the very essence of a lack of prejudice.

Review of the overall record of this case further undercuts any claim of structural error. The evidence in this case was powerfully incriminating. The defense attorney valiantly represented the defendant's interests and asserted the best defense available but the overwhelming evidence was such that "any rational finder of fact could have found that the State proved each element beyond a reasonable doubt." ***State v. Farnsworth***, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016), citing ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The evidence against the defendant can best be understood in a time line. Early in the case the state presented testimony from first responders, both police and emergency medical, that established that the defendant was the only person with the two month old victim when she suffered obvious, devastating, inflicted injuries that led to her death. RP 540-43. RP 553. The first responders found the baby in cardiac and respiratory arrest, and with a "kind of a pinkish, thick, slightly blood

tinged . . . mucus" coming from her nose and mouth. RP 541. RP 555. The paramedics were able to re-establish a pulse on the way to the emergency room at Madigan Hospital which caused the baby's color and condition to improve but there could be no mistaking that the baby had suffered life-threatening injuries while in the defendant's care. RP 242-43. This testimony was not challenged in any significant way. RP 544-50. RP 556-58.

The first responder police officers added to the quantum of evidence. Dupont police officer Dan Saboe testified that he asked the defendant, "what was going on", before learning from the medical providers that abuse was suspected. RP 618, 622-25. The defendant acknowledged having cared for the victim all afternoon, that his wife had brought her home and then gone back to work, that he fell asleep twice and so did the victim, and that it was after she woke up the second time that he called 911. RP 618-19. The defendant's demeanor was described as "low key, not excited, pretty just normal." RP 620. Needless to say the description of what the defendant said and his demeanor were incongruous with the baby's life threatening injuries. The defendant reported nothing that happened during the afternoon that could account for cardiac and respiratory arrest and bloody mucus coming from the baby's mouth and nose.

The jury first heard about the extent of the injuries from the Madigan emergency department pediatrician, Dr. Matthew Studer, MD. Dr. Studer testified that the baby had suffered grievous acute injuries requiring "pediatric advanced life saving". RP 572. Furthermore, the emergency CT scan showed: (1) "intracranial bleeds, including a subdural and an epidural hematoma, which are bleeds in certain spaces within the brain. . . skull fractures"[RP 575]; (2) skull fractures "bilateral", that is on both sides of the baby's head [RP 577]; (3) "a number of rib fractures . . . in multiple stages of healing, which is a red flag for a history of abuse or nonaccidental trauma"[*Id.*]; and (4) "a fracture of the right femur, described as a spiral fraction (sic.) . . . an abusive injury as well" caused by "grabbing the infant's thighs in anger and twisting. . . ." [RP 576]. The number of injuries and the multiple separate areas of the baby's body where they were found could hardly have been more at a variance from the defendant's benign description of what happened during the afternoon.

The defendant's statements to detectives added further to the body of evidence. These included a video tape recorded interview that was admitted into evidence. Exhibits 74 and 75. During his detective interviews the defendant denied that he had done anything to injure the victim. However, he admitted that he was her sole caretaker, that it must have happened while he was sleeping, and that although he gets frustrated

with babies when they won't stop crying, he would never hurt a child. *Id.* Again, considering the severity of the baby's injuries, these statements were powerfully incriminating.

The defendant's statements to the police, coupled with the severity of the victim's injuries, left trial defense counsel with little to work with. Nevertheless, the defense was vigorous. The victim's mother, Mary Cowart, was blamed by the defense for the trauma. RP 2096 et. seq. However, Mary Cowart testified, as did the babysitter who cared for the victim all morning. The jury had an ideal perspective with which to judge her credibility versus the defendant's.

Consistent with the defendant's statements to Officer Saboe and the detectives, Ms. Cowart testified that she picked up the victim from her care provider and brought her home in good health and good spirits to the defendant during the noon hour and then returned to work. RP 683-91. She first heard about the injury to her daughter from the defendant who called her at work saying, "Bella is not breathing. She's purple and you need to get home now. I already called the ambulance." RP 691. At the hospital the defendant professed not to know what happened. RP 692. Ms. Cowart's testimony was supported by Shelly Qvicklund, who in addition to confirming that the victim was in good health when she was picked up at noon, also took a photo of the victim while she was caring for

her which she shared electronically with Ms. Cowart to show how well she was doing. RP 685. RP 1296, et. seq.

The jury was not left to speculate about the victim's condition or demeanor while in either of her parent's care. Medical and pathology experts testified about her condition in light of the injuries. RP 1098, et. seq. RP 1209, et. seq. The victim was anything but normal after suffering the head and leg injuries. Dr. Thomas Clark testified that the head injury was "a devastating injury . . ." and that the victim "could not have been normal following this injury. . . ." RP 1135. Dr. Matthew Lacy testified that his post mortem review of the victim's brain showed that the injury had caused "big holes" and "these cysts or holes were present all over the brain." RP 1221. Finally, a pediatric trauma expert, Yolanda Duralde, testified that the fracture of the victim's leg alone would have been unbearably painful:

> The femur is a large bone in the body and hurts, so the child would scream initially and it would be very painful. In Bella's case, she actually was still having some muscle spasms when she came into the hospital and that actually is painful as well. When you talk to people who have had femur fracture as adults, they actually talk about muscle spasm as being one of the worst part of the pain. So you would expect that she, you know, obviously would have been upset and still in pain until that could be adjusted or relieved to some extent. So my understanding was that no one gave the history that she was in a lot of pain prior to whatever event it was that brought her to the hospital.
> Q. So what does that mean to you?

A. It means that happened at the same time or around that same time.
RP 1348-49.

The defendant testified in his own defense and in support of his claim that Mary Cowart had inflicted the fatal injuries. He claimed (1) that Ms. Cowart had not bonded with the victim but he had [RP 1887]; (2) that he knew how to care for the victim because he had three other children by a previous relationship [RP 1908]; (3) that when Ms. Cowart brought the victim home she was asleep [RP 1928]; (4) that inexplicably he woke up to find the victim "screaming" [RP 1930]; (5) that he changed her diaper and gave her "gripe water" and coaxed her back to sleep [RP 1931-35]; and (6) that when she woke up a second time, he comforted her but noticed blood on his shoulder and called 911 [RP 1936-38].

In light of the overwhelming wealth of evidence that the victim suffered her injuries while in the defendant's care, not the care of Mr. Cowart, and in light of unrebutted medical and pathological testimony as to the devastating and painful nature of the injuries, the conclusion that the victim suffered inflicted, intentional abusive trauma at the hand of the defendant was all but inescapable. As it was put by the Mary Bridge emergency doctor in cold, clinical terms:

> [S]he sustained injuries that were inflicted upon her, the injuries were severe. That, given the injuries, that she was not going to be able to support her own breathing; that she

> wasn't able to continue to breathe on her own, suffering her cardiac pulmonary arrest at which point 911 was called. Resuscitation efforts were tried, but the required resuscitation was prolonged, and that because of all of that she had a global -- her brain was deprived of oxygen, so global brain anoxic injury.
> RP 1417.

While juror eighteen may have caused the defendant concern during individual *voir dire*, she evidently allayed his fears during general *voir dire*. But be that as it may, it can be reasonably argued that any rational juror would have reached the same conclusion as this jury given the character of the evidence and the lack of support for the defendant's attempt to blame his wife, even though she was at work at the time. Accordingly, the defendant's conviction should be affirmed both because the trial court did not abuse its discretion during its first ruling concerning juror eighteen, and in any event because there is no support for the claim that structural error deprived the defendant of a fair trial.

2. IN THE EVENT THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY THIS COURT SHOULD EXERCISE ITS DISCRETION, AWARD APPELLATE COSTS AND DEFER CONSIDERATION OF THE DEFENDANT'S ABILITY TO PAY PENDING A FUTURE MOTION FOR REVISION OR AN ATTEMPT TO COLLECT.

RCW 10.73.160(2) states that "the court of appeals...may require an adult offender convicted of an offense to pay appellate costs." This provision provides appellate courts with legislative authorization to order the recoupment of some or all of the costs of an appeal from a defendant

who does not prevail. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). In ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016), Division I stated that the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also* RAP 14.2 and ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000). The issue is not whether this Court can order appellate costs, but whether it should and when.

The idea that those convicted of a crime should be required to pay some of the costs is not new. In 1976, the legislature enacted RCW 10.01.160 concerning trial court costs. A short time afterward in ***State v. Barklind***, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that costs which included contribution for appointed counsel under this statute did not "impermissibly burden defendant's constitutional right to counsel." *Id.* at 818.

Imposition of appellate costs is also not new. The statute was enacted in 1995 in response to ***State v. Rogers***, 127 Wn.2d 270, 281, 898 P.2d 294 (1995), which held that appellate costs could not be awarded in the absence of statutory authority. *See* Laws of 1995, Ch. 275 § 3, and ***State v. Nolan***, 141 Wn.2d at 623. ***Nolan*** examined RCW 10.73.160 and noted that it was enacted in order to allow the courts to require one whose conviction and sentence is affirmed on appeal to pay appellate costs including statutory attorney fees. *Id.* at 627. In ***Blank***, *supra*, at 239, the Supreme Court held the statute constitutional and affirmed this Court's

award of appellate costs as "reasonable". *See* ***State v. Blank***, 80 Wn. App. 638, 643, 910 P.2d 545 (1996).

In both ***Nolan*** and ***Blank***, the defendant initiated review of the appellate costs issue by filing an objection to the state's cost bill. ***State v. Blank***, 131 Wn.2d at 234, ***State v. Nolan***, 141 Wn.2d at 622. As to a defendant's ability to pay, the court in ***Blank*** stated: "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." ***State v. Blank***, 131 Wn.2d at 242 (footnote omitted).

In light of the Supreme Court's "common sense" observation in ***Blank,*** it can be argued that conditioning "appellate review" of an appellate costs issue on whether "the issue is raised in an appellant's brief" prematurely raises an issue not then properly before the court. The court in ***Sinclair*** concluded (somewhat in contradiction of ***Blank***) that, "Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor." ***State v. Sinclair***, 192 Wn. App. at 389. In addition, under RCW 10.73.160(4), the proper time for considering a defendant's ability to pay appellate costs is when the state

seeks to collect. ***State v. Blank***, 131 Wn.2d at 242; ***State v. Smits***, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991). At that time there would generally be no need to speculate as to the defendant's financial status and thus an accurate and timely determination can be made of whether the costs "will impose a manifest hardship on the defendant or the defendant's immediate family". RCW 10.73.160(4).

Prior to the time of collection, the determination of whether the defendant either has or will have the ability to pay is necessarily speculative. ***State v. Baldwin***, 63 Wn. App. at 311, ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). It has been suggested that the proper time for determining if a defendant is indigent "is the point of collection and when sanctions are sought for nonpayment" as to appellate costs. ***Blank***, 131 Wn.2d at 241–242, ***State v. Wright***, 97 Wn. App. 382, 383-84, 965 P.2d 411 (1999). In summary, as noted in ***Blank*** "there is no reason [at the time of the decision] to deny the State's cost request based upon speculation about future circumstances." *Id.* at 253.

It is important to acknowledge that in ***Blazina***, the Supreme Court rejected the argument that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." ***State v. Blazina***, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (footnote one), ***State v. Shirts,*** 195 Wn. App. 849, 854-55, 381 P.3d 1223 (2016). However the statute at issue in ***Blazina*** and ***Shirts*** specifically prohibited trial courts from

ordering a "defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). That prohibition is not included in the appellate costs provision. *See* RCW 10.73.160.

Most criminal defendants are represented on appeal at public expense. RCW 10.73.160(3) specifically allows for "recoupment of fees for court-appointed counsel." Since defendants with "court-appointed counsel" are necessarily indigent, the statutory provision for attorney fees would be meaningless if such fees were invariably denied on the basis of ability to pay. By enacting RCW 10.01.160 and RCW 10.73.160, the legislature expressed its intent that criminal defendants, including the indigent, should contribute to the cost of their cases.

RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 was enacted in 1995. These legislative determinations should be given full effect. An award of costs should reflect to some extent the cost to the public of an appeal. A rational basis on which to determine the amount could be this Court's judgement about the quality of the appellate lawyering exhibited by the defense in the appeal compared to the amount submitted in a cost bill as having actually been expended. Presumably this would approximate the value to the defendant of the effort expended on his behalf. As to ability to pay, this Court can award appellate costs, including attorney fees, on the basis of the actual cost of this appeal or even with a discount, it does not abuse its discretion. This Court may

exercise its discretion secure in the knowledge that ability to pay must be taken into account "before enforced collection or any sanction is imposed for nonpayment. . . ." ***State v. Blank***, 131 Wn.2d at 242.

D. CONCLUSION.

For the foregoing reasons the state submits (1) that the defendant's conviction and sentence should be affirmed, and (2) that this court should exercise its discretion and award reasonable appellate costs in the event that the state is the substantially prevailing party.

DATED: Thursday, December 08, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

/s/ JS

JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-8-16 Theresa Ka
Date Signature

PIERCE COUNTY PROSECUTOR

December 08, 2016 - 4:11 PM

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